Civil Reference

Before Kapur and Soni, JJ.

MESSRS SALIGRAM ETC.,—*Petitioners,*

versus

COMMISSIONER OF INCOME-TAX.—*Respondent.*

1951

Dec 24th

Civil Reference No. 8 of 1949

Income-tax Act (XI of 1922), Section 66 (1)—Whether High Court can suo moto *call upon the Tribunal to state a question which in its opinion arises out of the order of the Tribunal—Excess Profits Tax Act (XV of 1940), Sections 10 and 10-A—Onus of proving that the transaction was for avoidance of Excess Profits Tax, though on the Department, whether of any consequence when the matter reaches the stage of a stated case.*

Held, that High Court cannot *suo moto* call upon the Tribunal to state a question which in its opinion arises out of the order of the Tribunal. Under section 66 (5), the duty of the High Court is only to decide the questions of law raised by the case referred to them by the Tribunal.

Held also, that onus is not ambulatory, but is on the Revenue to prove that the main purpose is to avoid the payment of Excess Profits Tax. But when the matter reaches the stage of a stated case, the question is not properly one of onus. It is simply a question of whether the facts found and stated afford evidence on which the Tribunal could properly arrive at their conclusion.

Case referred by the Income-tax Appellate Tribunal, Bombay, under section 66 (1) of the Indian Income-tax Act of 1922, read with section 21 of the Excess Profits Tax Act, 1940, for decision.

In the matter of the Excess Profits Tax Act, XV of 1940 and in the matter of the Excess Profits Tax Assessment of Messrs Salig Ram Rajkumar, Amritsar, for chargeable accounting period from the 28th July 1943 to 25th July 1944.

S. D. BAHRI and K. L. MEHRA, for Petitioners.

S. M. SIKRI and H. R. MAHAJAN, for Respondent.

KAPUR, J. This is a reference made by the Income-tax Appellate Tribunal at Allahabad dated

Messrs Saligram etc., *v.* Commissioner of Income-tax

Kapur J.

the 21st of July 1949 and it referred the following questions to this Court :—

"1. Whether there is material or evidence on the record to come to the conclusion that the main purpose of the separation of the business was the reduction of excess profits tax payable by the family ?

2. Whether on the facts and in the circumstances of the case, section 10A of the Excess Profits Tax Act has been rightly applied ?"

As the statement of the case was found not to be sufficient the case was sent back to the Tribunal for a better statement of the case to be sent along with all relevant documents which has now been done.

The following pedigree-table will show the relationship of the various persons who formed a joint Hindu family at one time :—

Salig Ram

Chuni Lal | Muni Lal | Raj Kumar

The business of the family consisted of—

(1) The Indian Silk and Woollen Mills, Amritsar, where silk and woollen cloth was manufactured ;

(2) a finishing plant which consisted of calendering machinery which was situate in the same premises where the main factory was;

(3) a sales depot at Amritsar.

The accounting period seems to have been from July of one year to August of the following year and in another year from August of one year to July of the following year. The profits which have been assessed to income-tax in the different assessment years were as follows :—

Assessment year		*Assessed income*
1940-41	..	Rs. 6,419
1941-42	..	Rs. 33,392
1942-43	..	Rs. 44,935
1943-44	..	Rs. 70,336

On the 6th of April 1940 the Excess Profits Tax Act, XV of 1940, was enacted which came into force

on the 13th of April 1940. The originally enacted section 10 of this Act provided that if any person for the purpose of reducing any excess profits enters into any fictitious or artificial transaction his liability for excess profits tax will remain unaffected. An artificial transaction was defined in the old Act. By Act XXIV of 1941 which came into force in November 1941 section 10 was amended and another section 10A was added.

On the 5th September 1941 a deed of relinquishment was executed by Chuni Lal, Muni Lal and Salig Ram whereby the factory called the Indian Silk and Woollen Mills, Amritsar, which along with the land, machinery, stock in hand and buildings was valued at Rs. 65,000 was taken by Chuni Lal and Muni Lal and they "severed their connection from the joint Hindu family" and by this deed they took this property in equal shares. It may be pointed out that Raj Kumar was a minor at the time. For the assessment year 1943-44 two separate returns were made for the purpose of Income-tax Act, one by Salig Ram on behalf of himself and his minor son as a joint Hindu family and the other by the partnership consisting of Chuni Lal and Muni Lal. After examination of the document the Income-tax Officer, Mr. Sachdeva on the 10th of October 1944 held that they were entitled to separate assessment since there had been a partial partition, but he held that the transaction fell under section 10A of the Excess Profits Tax Act and therefore made a joint assessment under that Act. He gave the following three reasons :—

(1) The deed did not give the exact cause of separation of the two sons and there was no circumstance like there being separate mother of the two sets of sons ;

(2) all the three sons are from the same mother who is still alive ; and

(3) the explanation given to him that the two sons wanted to do independent business and that their father would not allow them to exercise their ability in extending their business is not correct.

Messrs Saligram etc., *v.* Commissioner of Income-tax

Kapur J.

He was of the opinion that the main purpose for which the partial partition had taken place was to avoid the payment of excess profits tax. This was for the chargeable accounting period from 26th July 1941 to 31st July 1942 and the same order was passed for the chargeable accounting period from the 1st of August 1942 to 27th July 1943.

The matter was taken up in two appeals by Salig Ram to the Income-tax Appellate Tribunal at Allahabad who dismissed the appeal by their order in 10-A E.P.T.A.A. holding that there was no valid reason given for separation and that the main purpose of the partial partition was the avoidance of the excess profits tax. On an application made by the assessees Salig Ram-Raj Kumar the case was stated to the Lahore High Court and the two questions which I have given above were referred to that Court. No decision was given by the Lahore High Court at least none has been shown to have been given.

For the year 1945-46 relating to the chargeable accounting period commencing from 28th July 1943 and ending with 26th July 1944 an appeal was taken to the Income-tax Appellate Tribunal where the same questions were raised and the previous order was upheld in 10-A. E. P. T. A. A. No. 19(Pb) of 1945-46 on the 24th of September 1948. Again, the assessees made an application for a statement of the case to the Court which was done by a statement, dated the 21st of July 1949 which when it came up before my learned brother Soni, J., and myself was found to be inadequate and a further statement was called for which has now been sent.

The first question which has been raised by the assessee is that we should decide or ask the Tribunal to refer the following question :—

> "Whether the finding of the Tribunal is not vitiated by the fact that the Tribunal failed to consider the evidence in the case and based its order on the previous order of the Tribunal."

Under section 66(1) within sixty days of an order made by the Appellate Tribunal the assessee can require the Appellate Tribunal to refer to the High Court any question of law which arises out of such order and the Appellate Tribunal has to draw up a statement of the case within ninty days of the receipt of this application. If the Appellate Tribunal refuses to state the case on the ground that no question of law arises the assessee can within six months from the date of the order of such refusal apply to the High Court and the High Court is empowered then to call upon the Appellate Tribunal to make the reference. There is no provision as far as I know and none has been pointed out by which the High Court can *suo moto* call upon the Tribunal to state a question which in its opinion arises out of the order of the Tribunal or the Tribunal can make a supplemental statement adding a further question of law which was never raised by the assessee or the Commissioner as the case may be before it. We took this view in *Sir Sobha Singh* v. *The Commissioner of Income-tax, Delhi,* (1) and in *Commissioner of Income-tax, Bihar* v. *Maharajadhiraj of Darbhanga,* (2) their Lordships of the Privy Council at page 335 deprecated such a practice, where it was pointed out that—

> "The duty of the High Court under section 66(5) is to 'decide the questions of law raised' by the case referred to them by the Commissioner and it is for the Commissioner to state formally the questions which arise. Here the High Court itself formulated the question to be decided as being :—
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> * * * * * * * * * *

Their Lordships deprecated this departure from regular procedure * * * * *"

I am, therefore, of the opinion that no further question can be raised at this time.

(1) 52 P. L. R. 399.
(2) I. L. R. (1933) 12 Pat. 318.

Messrs Saligram etc., *v.* Commissioner of Income-tax

Kapur J.

I may here add that although fault was found with the way the case was decided by the Tribunal in regard to the assessment year 1945-46 it appears that the assessee himself had stated that he had nothing more to add by way of argument excepting what had already been stated at the hearing of the previous appeals and there were no fresh facts to be taken into account other than those which were already on the record, and it was under these circumstances that the Tribunal took an extract from the findings of their predecessors and adopted them, saying that they were in entire agreement with the reasons given in the previous order and the conclusions arrived at. It would in my opinion have been better if they had independently given their findings, but the way the case was dealt with does not show that the evidence on the record or the circumstances were not considered by the Tribunal although an order in the form that it might well have been given was not given by them,

The next question to be decided is what answer should be given to the questions which have been referred to. The first question is :—

> "Whether there is any material or evidence on record to come to the conclusion that the main purpose of the separation of the business was the reduction of excess profits tax payable by the family ?"

In paragraph 3 of their better statement of the case the Tribunal have given the following facts :—

(1) Salig Ram, the father, was a partner in another firm known as Harbans Lal-Chuni Lal which manufactured hand-loom cloth.

(2) This firm was dissolved and the family set up the Indian Silk and Woollen Mills in July 1938 under the supervision of Chuni Lal who had received training in a Government Technical School and was assisting his father in the management of the firm.

(3) Chuni Lal was married in 1933 or 1934 and was living with his mother-in-law in 1939, she being a rich woman who wanted her son-in-law and daughter to live with her as the daughter was her only child.

(4) Muni Lal was living in the factory premises with his wife.

(5) The reasons given for the separation by the sons that there was trouble with the parents and quarrel amongst the women and the father did not allow the extension of business were not accepted by the Excess Profits Assessment Officer nor by the Tribunal.

(6) There was not a complete partition but two sons were allowed to go out of the family taking Rs. 65,000 worth of assets with them.

(7) The Tribunal were not satisfied with the evidence of Salig Ram and Chuni Lal as to the reasons for separation.

(8) Business of the family was becoming progressively prosperous which is shown by the figures of profits (which have already been given by me).

From these facts the Income-tax Tribunal concluded that there was no separation.

Mr. Bahri for the assessee has submitted that the *onus* of proof was on the Income-tax authorities to establish that the main purpose of the transaction, viz., partial separation, was avoidance of excess profits tax and that they have not established. On the other hand it appeared that the Appellate Tribunal proceeded on the basis that the *onus* was on the assessees. He relied on a Bench judgment of the Allahabad High Court in *Ganga Sahai Umrao Singh* v. *Commissioner of Excess Profits Tax U.P.*, (1) where it was held that the burden was on the Department to prove the charge against the assessee that he had done something with the main purpose of evading payment

(1) A. I. R. 1950 All 595.

Messrs Saligram etc., v. Commissioner of Income-tax

Kapur J.

of the tax, and the fact that the Department cannot lead any direct evidence to prove this does not shift the burden on to the assessee to justify their action. Unless such facts or circumstances are placed before the Appellate Tribunal as would lead to a reasonable inference that the main purpose was to evade payment of the Excess Profits Tax, the Tribunal is not justified in coming to that conclusion, merely because the assessee had failed to give a satisfactory reason and in such a case, it is the duty of the Excess Profits Tax Officer to investigate the facts carefully and look into such other circumstances as would lead to a reasonable inference that the main purpose behind the transaction was to evade the tax. In the circumstances of the case there placed before the learned Judges they came to the conclusion that the main purpose had not been proved to be the avoidance of excess profits tax. A judgment of Atkinson, J., in ***Dixon and Gaunt, Ltd.,*** v.*Inland Revenue Commissioner* **(1), was also relied** on in the Allahabad case which refers to a judgment of the House of Lords in *Fattorini, Ltd.*, v. *Inland Revenue Commissioners*, (2). No doubt these cases do suggest that the *onus* is not ambulatory, but is on the Revenue to prove that the main purpose is to avoid the payment of excess profits tax, but in my opinion as was said by Lord Macmillan at page 628 of the Report :—

> " When the matter reaches the stage of a stated case the question is not properly one of *onus*. It is simply a question of whether the facts found and stated afford evidence on which the board could properly arrive at their conclusion. "

In the present case there are certain facts which stand out pre-eminently and which can and should be called material because they are circumstances which if believed by a Court of fact would make the findings of the Tribunal as supported by evidence and they are :—

(i) The passing of the Act in April 1940. In the assessment year 1940-41 the income of

(1) (1947) 1 All. E. R. 723.
(2) (1942) 1 A. E. R. 619.

the joint Hindu family was only Rs. 6,419 and in the year 1941-42 it was Rs. 33,392 which in the following assessment year rose to Rs. 44,935 and in the year 1943-44 was as much as Rs. 70,336. The order of the Excess Profits Tax Assessment Officer, dated the 10th October 1944, shows that for that year which was the chargeable accounting period from 26th July 1941 to 31st July 1942 the total business profit was Rs. 70,336. In the previous year as I have said, the profit was Rs. 44,935 which was above the limit for excess profits tax which was Rs. 36,000. Therefore for the year July 1940 to July 1941 the income had already reached a limit of more than Rs. 36,000, and it was after this income was made and there was a likelihood of a higher income in the following year that on the 5th of September 1941 a partial deed of separation was entered into.

(ii) It is significant that the partition should have taken place at a time when the expectation of profits was very high and profits of the previous year were more than Rs. 36,000.

(iii) One explanation for the partition was given in the deed, viz., there were family squabbles, but that was not established.

(iv) Another set of reasons was given before the Excess Profits Tax Officer which was not accepted by the Tribunal.

So that it comes to this that the facts which were relied on were rising profits, coming into force of the Excess Profits Tax Act and false explanation for the separation.

The learned Advocate-General has relied on three judgments of the Allahabad High Court. *Sohan Pathak and Sons* v. *Commissioner of Income-tax, U.P.,*

Messrs Saligram etc., v. Commissioner of Income-tax

Kapur J.

(1), where partial partition was accepted by the Income-tax Officer; the assets of the joint family business were equally divided among the four groups of members forming the family and two separate partnerships were then started by these four groups with the capital which was received from the family, the four branches having equal shares in the profits. In these circumstances the Tribunal had come to the conclusion that the main purpose was not the reason given by the partners, having been made at a time when profits had gone up considerably and consequently on these facts section 10A of the Excess Profits Tax Act applied. Chief Justice Malik said at page 209 as follows :—

> "The grounds on which the Excess Profits Tax Officer had acted are set out in paragraph 4 of the statement of the case. Even if we discard the grounds on which the Excess Profits Tax Officer had come to the conclusion that the main purpose was to avoid payment of excess profits tax, it cannot be said that on the facts found by the Appellate Tribunal it was not justified in drawing the inference that the main purpose behind the partial partition was the avoidance or reduction of liability to excess profits tax. This is our reply to question No. III."

In the second case *Dhaukal Mal Dwarka Prasad* v. *Commissioner of Income-tax, U.P.*, (2), the *Karta* of the family was carrying on several kinds of businesses. He joined his son-in-law and a son of a servant and separated the cloth business which was accepted as a partnership firm under section 26A of the Income-tax Act. The Excess Profits Tax Officer, however, held that the cloth business had been started with the main purpose of reducing the liability to pay excess profits tax, and it was held that on these facts the Tribunal could hold that this was the main purpose and that it could not be said that there was no material on which this conclusion could be arrived at. There is also another case in the same volume

(1) 19 I. T. R. 190.
(1) 19 I. T. R. 199.

Maheshwari Devi Jute Mills, Ltd. v. *Commissioner of Income-tax*, (1), but I am unable to derive much assistance in the decision of the present case from that case.

Reliance was then placed by the Advocate-General on the Madras case *Commissioner of Income-tax, Madras*, v. *The Coimbatore Pioneer Mills, Ltd.*, (2). There a company which was at one time a non-director-controlled company by a change in the articles of association converted itself into a director-controlled company, as a result of which its income for the purposes of excess profits tax was reduced. It was there argued that there were no facts to justify an inference that the object of introducing the amendment was to evade the payment of the excess profits tax. Satyanarayana Rao, J., at page 1015 said :—

> "The intention or the purpose with which the amendment was introduced is a matter which can be inferred only from the circumstances attending the transaction. It is not a matter which is capable of direct proof."

Viswanatha Sastri, J., wrote a separate but concurring judgment. In that case it was proved that the capital of the company had been substantially increased in the year 1940-41 and 1941-42 and if it was to be taxed as a director-controlled company the quantum of its liability would be appreciably less than what it would have been if it were a non-director-controlled company. It was also found that the demand for textiles was improving and the time factor was taken to be one of importance. Counsel for the assessee, however, tried to distinguish this case on the ground that here the *onus* was held to have been placed on the assessee. I am unable to agree. I have already said that at the time when the case is stated the question of *onus* really becomes unimportant. What has to be taken into consideration is whether there are facts or circumstances or both which would support the finding of the Income-tax Tribunal in regard to its decision on the

(1) 19 I. T. R. 507.
(2) I. L. R. Mad. 1010.

Messrs Saligram etc., *v.* Commissioner of Income-tax

Kapur J.

question of main purpose of the transaction. In the present case the time factor, as I have shown above, assumes a very great deal of importance. The fact that the partial partition was effected at a time when the income was going up during the period of the war coupled with the fact that by partial partition the manufacturing plant had gone to one set of brothers and the finishing plant and the selling agency to another set of brothers and the fact that wrong explanation was given as being the purpose of the partition are in my opinion sufficient to support the finding given by the Appellate Tribunal.

I would therefore answer the first question in the affirmative and the answer to the second would also be in the affirmative. The assessee should pay the costs of the Commissioner for Excess Profits Tax which I assess at Rs. 300.

SONI, J. I agree.

Supreme Court

CIVIL APPELLATE JURISDICTION

Before Saiyid Fazal Ali and Vivian Bose, JJ.

THE RUBY GENERAL INSURANCE CO. LIMITED,—
Appellant,

versus

SHRI PEAREY LAL KUMAR AND ANOTHER,—*Respondents.*

Arbitration Act (X of 1940), Section 33—Scope of—What points in dispute between the parties fall to be decided by the arbitrator or by the Court—Test laid down—Practice—Appeal to Supreme Court—Amendment of application under section 33, Arbitration Act, whether to be allowed.

1952

Feb 25th

P got his car insured with the appellant-Company. Clause 7 of the Policy of Insurance provided that all differences "arising out of this policy" would be referred to arbitration and that if the Company disclaimed liability and the matter was not referred to arbitration within 12 months of such disclaimer, the claim would, for all purposes, be deemed to have been abandoned and would not be recoverable. The car was lost and P claimed its value from the Company which disclaimed liability under clause 7 of the policy. P took proceedings for arbitration more than 12 months after final disclaimer by the Company. The Company filed an application under section 33 of the Arbitration